

A **SEPIDEH GOLROKHFAR ABDOLLAH v. PP**
 COURT OF APPEAL, PUTRAJAYA
 MOHTARUDIN BAKI JCA
 TENGKU MAIMUN TUAN MAT JCA
 ZAMANI A RAHIM JCA
 B [CRIMINAL APPEAL NO: B-05-124-05-2015 (IRN)]
 14 JANUARY 2016

C **CRIMINAL LAW:** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in dangerous drugs – Presumption of knowledge under s. 37(d) – Whether rebutted – Whether reasonable doubt raised on prosecution case – Whether conviction safe*

D **CRIMINAL PROCEDURE:** *Appeal – Trial judge’s findings – Trafficking in dangerous drugs – Defence of accused that third person gave food packages containing dangerous drugs – Whether adequate weight given to defence – Whether third person fictitious character – Whether third person proven to be actual owner of dangerous drugs – Whether there was misdirection by trial judge – Whether accused rebutted presumption of knowledge – Whether conviction safe – Criminal Procedure Code, s. 182A(1) – Whether complied with Dangerous Drugs Act 1952, ss. 37(d) & 39B(1)(a)*

E The appellant, an Iranian national, was charged in the High Court for trafficking in dangerous drugs at the Kuala Lumpur International Airport, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (‘DDA’). SP6, a senior customs officer, upon seeing that the appellant, who was carrying two bags (‘exhs. P9 and P10’), behaving suspiciously, stopped her and directed her to scan the bags. A suspicious images were seen in exh. P9 and further examination of the bag revealed food packages in which small plastic packets containing crystal-like substance suspected to be drugs were found. Upon analysis, the substances were confirmed by the chemist to contain methamphetamine weighing 641.4g and 447.8g. Having found that a *prima facie* case of trafficking in dangerous drugs had been established the appellant was ordered to enter her defence. In her defence, the appellant stated that before departing from Damascus Airport, Syria to Malaysia, she had befriended five Iranian men who were also travelling in the same flight with her, one of whom was Abbas. The appellant stated that Abbas had sought her assistance to bring in her bag the food packages containing foodstuff which were not available in Malaysia and she had done so. At the conclusion of the trial, the trial judge held, *inter alia*, that the appellant’s defence was a bare denial and that her version could not be believed. The appellant was found guilty as per the charge and was convicted and sentenced to death. The issue raised for the court’s determination was whether the trial judge had failed to appreciate the appellant’s defence that it was Abbas who had given her the food packages and that Abbas was not a fictional person.

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Held (allowing appeal; setting aside decision of the High Court)
Per Zamani A Rahim JCA delivering the judgment of the court:

- (1) The trial judge, having made a positive finding that Abbas was not a fictitious character, had failed to appreciate the appellant's defence that it was Abbas who had given her the food packages. The defence was raised by the appellant and put to the prosecution's witnesses at the earliest reasonable opportunity during the prosecution's case and further, fortified her defence by identifying Abbas in the course of her giving evidence at the defence stage. Therefore, adequate weight ought to be given to the appellant's defence. It was clearly not an afterthought defence but one that was supported by the independent testimony of SD2 and more importantly the appellant had identified Abbas in the court. (para 30)
- (2) It was proven that Abbas was the actual owner of the food packages found in the appellant's bag. SD2 had explained as to what had transpired at the cafe in Damascus Airport. Unfortunately, there was nowhere in his grounds of judgment that the trial judge had considered the evidence of SD2 and also as to why SD2's evidence could not be accepted by the court. The trial judge had clearly omitted the consideration of SD2's evidence which amounted to a serious non-direction warranting appellate intervention. Therefore, the trial judge had failed to comply with s. 182A(1) of the Criminal Procedure Code. (para 31)
- (3) It is trite law that there is no burden placed on the appellant to call witnesses to corroborate her defence in court. There was no duty on the part of the appellant to call any evidence including Abbas as her witness. By disbelieving the appellant's version of the story for failure to call Abbas as a witness, the trial judge had clearly placed a duty on the defence, which was clearly erroneous and a misdirection. (paras 33 & 34)
- (4) The appellant had succeeded in rebutting the presumed knowledge under s. 37(d) of the DDA on the balance of probabilities and also in raising a reasonable doubt on the prosecution's case. The prosecution had therefore failed to prove a case of beyond reasonable doubt. In the circumstances, the appellant's conviction was unsafe. (paras 35 & 36)

Bahasa Malaysia Headnotes

Perayu, seorang warganegara Iran, dipertuduh di Mahkamah Tinggi kerana mengedar dadah berbahaya di Lapangan Terbang Antarabangsa Kuala Lumpur, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). SP6, seorang pegawai kanan kastam, apabila melihat perayu, yang sedang membawa dua beg ('eks. P9 dan P10'), berkelakuan mencurigakan, menahannya dan mengarahkannya mengimbas beg-beg tersebut. Imej

- A mencurigakan kelihatan dalam eks. P9 dan pemeriksaan lanjut beg tersebut mendedahkan bungkusan makanan yang di dalamnya terdapat bungkusan-bungkusan plastik kecil mengandungi bahan kristal yang disyaki dadah ditemui. Selepas analisis, bahan tersebut disahkan oleh ahli kimia sebagai mengandungi methamphetamine seberat 641.4g dan 447.8g. Setelah
- B mendapati kes *prima facie* pengedaran dadah berbahaya dibuktikan, perayu diperintahkan membela diri. Dalam pembelaannya, perayu menyatakan bahawa sebelum berlepas dari Lapangan Terbang Damascus, Syria ke Malaysia, dia berkenalan dengan lima lelaki Iran yang menaiki penerbangan yang sama salah seorang daripada mereka bernama Abbas. Perayu
- C menyatakan Abbas meminta bantuannya untuk membawa dalam begnya, bungkusan makanan mengandungi bahan makanan yang tidak boleh didapati di Malaysia dan dia berbuat demikian. Di akhir perbicaraan, hakim bicara memutuskan, antara lain, bahawa pembelaan perayu satu penafian semata-mata dan versinya tidak boleh dipercayai. Perayu didapati bersalah seperti
- D yang dipertuduh dan disabitkan dan dijatuhkan hukuman mati. Isu yang dibangkitkan bagi pertimbangan mahkamah adalah sama ada hakim bicara gagal mempertimbangkan pembelaan perayu bahawa Abbas yang telah memberikan bungkusan makanan tersebut kepadanya dan Abbas bukan watak rekaan.
- E **Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi)**
Oleh Zamani A Rahim HMR menyampaikan penghakiman mahkamah:
- (1) Hakim bicara, setelah membuat dapatan positif bahawa Abbas bukan watak rekaan, gagal mempertimbangkan pembelaan perayu bahawa
- F Abbas yang telah memberikannya bungkusan makanan tersebut. Pembelaan tersebut dibangkitkan oleh perayu dan dikemukakan kepada saksi-saksi pendakwaan pada peluang terawal semasa kes pendakwaan dan selanjutnya mengukuhkan pembelaannya dengan mengenal pasti Abbas semasa memberikan keterangannya pada peringkat pembelaan.
- G Oleh itu, beban yang secukupnya wajar diberikan pada pembelaan perayu. Ia jelas bukan pembelaan fikiran semula tetapi sesuatu yang disokong oleh keterangan bebas SD2 dan lebih penting lagi, perayu telah mengenal pasti Abbas di mahkamah.
- (2) Telah dibuktikan bahawa Abbas adalah pemilik sebenar bungkusan makanan yang ditemui dalam beg perayu. SD2 telah menjelaskan apa yang berlaku di kafe di Lapangan Terbang Damascus. Malangnya, tiada di mana-mana dalam alasan penghakimannya, hakim bicara mempertimbangkan keterangan SD2 dan juga mengapa keterangan SD2 tidak boleh diterima mahkamah. Hakim bicara jelas meninggalkan pertimbangan keterangan SD2 yang membentuk salah arahan serius yang mewajarkan campur tangan rayuan. Oleh itu, hakim bicara gagal mematuhi s. 182A(1) Kanun Tatacara Jenayah.
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- (3) Undang-undang adalah matan bahawa tiada beban diletakkan atas perayu untuk memanggil saksi-saksi untuk menyokong pembelaannya di mahkamah. Tiada kewajiban pada pihak perayu memanggil apa-apa keterangan termasuk Abbas sebagai saksinya. Dengan tidak mempercayai versi cerita perayu bagi kegagalan memanggil Abbas sebagai saksi, hakim bicara jelas meletakkan kewajiban atas pembelaan, sesuatu yang jelas khilaf dan adalah satu salah arahan. A
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- (4) Perayu berjaya mematahkan anggapan pengetahuan di bawah s. 37(d) ADB atas imbalan kebarangkalian dan juga membangkitkan keraguan munasabah terhadap kes pendakwaan. Pihak pendakwaan, oleh itu, gagal membuktikan kes melampaui keraguan munasabah. Dalam keadaan tersebut, sabitan perayu tidak selamat. C

Case(s) referred to:

- Azmer Mustafa v. PP* [2014] 8 CLJ 413 CA (*refd*)
Lew Wai Loon v. PP [2014] 2 CLJ 649 FC (*refd*)
Nachilongo Doreen (W/Zimbabwe) v. PP [2014] 1 LNS 24 CA (*refd*) D
Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC (*refd*)
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC (*refd*)
Prasit Punyang v. PP [2014] 7 CLJ 392 CA (*refd*)
State of Kerala v. MM Mathew [1978] SCC 65 (*refd*)
Teh Hock Leong v. PP [2008] 4 CLJ 764 CA (*refd*) E

Legislation referred to:

- Criminal Procedure Code, s. 182A(1)
 Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(1)(a), (2)
For the appellant - N Sivananthan (Tina Ong with him); M/s Sivananthan
For the respondent - Nurshafini Mustafha; DPP F
 [Nota pengarang: Appeal from High Court, Shah Alam; Criminal Trial No: 45A-32-03-2012 (overruled).]
Reported by S Barathi

JUDGMENT G

Zamani A Rahim JCA:

Introduction

- [1] Sepideh Golrokhfar Abdollah, the appellant, an Iranian national was charged in the High Court at Shah Alam for trafficking in dangerous drugs at the International Arrival Hall, Kuala Lumpur International Airport (KLIA), an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39B(2) of the same Act. The charge reads as follows: H
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Bahawa kamu pada 1 Oktober 2011, lebih kurang jam 1.00 pagi di Cawangan Pemeriksaan Penumpang (CPP1), Balai Ketibaan Antarabangsa, Terminal Utama Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan,

- A telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 1,089.2 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

- [2] At the conclusion of the trial, the High Court judge found the appellant guilty as charged. She was convicted and sentenced to death. We heard the appellant's appeal and having considered the appeal records and the submissions of learned counsel for the appellant and the learned Deputy, we allowed the appeal. We now give our reasons.
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The Prosecution's Case

- C [3] On 1 October 2011, at about 1am, two Senior Customs Officers, Elangovan a/l Rehnesamy (SP6) and Ramis a/l Manikam (SP7) were on duty at the International Arrival Hall of the KLIA. SP6 and SP7 were checking the Aman-Kuala Lumpur international passengers who had arrived on a Royal Jordanian RJ Flight No. 180.

- D [4] While checking the passengers, SP6 spotted a lady (later identified as "the appellant") behaving suspiciously. The appellant was carrying two bags – one was a trolley black bag of EMC brand, exh. P9 and the other was a hand-carry bag, exh. P10. SP6 stopped the appellant and directed her to take the exhs. P9 and P10 to the scanner machine "D" to be scanned.
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- [5] Both bags were scanned. A suspicious image was seen in exh. P9 which was locked. Exhibit P9 was opened by the appellant using the combination lock "000". Several foodstuff packages were found in it. One of the packages was "Good Day CappuccinO". On examining it, SP7 found there were 27 small plastic packets containing crystal-like whitish substance suspected to be drugs.
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- [6] The appellant was then taken to the customs office CPP1. On further examination, another package identified as "COFFEEMIX 3 in 1" was discovered. Inside the "COFFEEMIX 3 in 1" package, there were 36 small plastic packets containing similar whitish substance suspected to be drugs.
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- [7] A field test was carried out by SP6 on the whitish substance and it was found to be methamphetamine.

- H [8] The 27 small plastic packets from the "Good Day CappuccinO" package and the 36 small plastic packets from the "COFFEEMIX 3 in 1" package were marked and tendered as exhs. P16(1)-(27) and P18(1)-(36) respectively. The exhs. P16(1)-(27) and exhs. P18(1)-(36) were sealed in transparent plastic packages marked "X" and "Y" by Muhammad Farhan bin Izhar (SP9), the investigating officer (I.O).

- I [9] On 4 October 2011 the transparent plastic packages marked "X" and "Y" and their respective contents were sent by the I.O to the government chemist, Suhana binti Ismail (SP5) for analysis.

[10] Upon analysis, the whitish substance in exhs. P16(1)-(27) and exhs. P18(1)-(36) were confirmed by the chemist, SP5 to contain methamphetamine, weighing 641.4g and 447.8g respectively.

[11] Methamphetamine is a dangerous drug as listed in the First Schedule of the Act.

Findings Of The Trial Judge At The Close Of The Prosecution's Case

(i) The discrepancies in the oral testimonies of SP6 and SP7 pertaining to the place of examination of exh. P9 was not fatal to the prosecution's case. The trial judge believed that the examination of the packages were carried out by SP6, SP7 and SP9. These customs officers (SP6, SP7 and SP9) could not have conspired or fabricated the evidence against the appellant who was facing a capital offence of drugs trafficking: see *State of Kerala v. MM Mathew* [1978] SCC 65.

(ii) There was no break in the chain of evidence, as proper markings were made on the exhibits, they were positively identified and the movements of the exhibits were recorded. "The discrepancy in the weight of the drugs alone should not *ipso facto* cast doubt on its identity": see *Lew Wai Loon v. PP* [2014] 2 CLJ 649.

(iii) The trial judge found that the appellant did not disclose to SP6 and SP9 the identity of the Iranian man who was seen walking with her in the CCTV footages. The trial judge was of the view that it was not for the prosecution to investigate the said Iranian man but for the appellant to explain this.

(iv) The drugs was cleverly packed in the packages - Good Day CappuccinO and COFFEEMIX 3 in 1 - and exh. P9 was cleverly concealed to avoid detection. The drugs was also not meant for personal consumption. In the circumstances, the statutory presumption under s. 37(d) of the Act had been raised as the drugs was found in the custody and control of the appellant.

(v) The appellant was found to enter this country, caused her passport to be stamped by the immigration, and she carried the bag, exh. P9 containing the drugs until she was stopped by SP6. The trial judge found the appellant was trafficking in the dangerous drugs within the meaning of s. 2 of the Act.

(vi) The trial judge had accepted the evidence of the government chemist, SP5. His Lordship was satisfied that the subject matter of the charge was methamphetamine, having a total weight of 1,089.2g.

[12] The trial judge held that a *prima facie* case of trafficking in dangerous drugs was made out. The appellant was ordered to enter her defence as charged.

A Defence Case

[13] The appellant gave evidence on oath. She called two defence witnesses, Hameedreza Mohammadi, SD2 and Insp. Haryati bt Zahrudin, SD3.

B [14] The appellant claimed she was a widow. She worked in Tehran as a hairstylist with an income of approximately USD700 to USD1,000 per month.

C [15] On 29 September 2011, the appellant was desirous of coming to Malaysia on the invitation of her friend named Niloofar Moradi. Niloofar was a student in this country. The appellant was also keen to scout around for hair extension equipment which was said to be cheap in Malaysia.

[16] The appellant brought along with her two bags namely, exh. P9 which she checked in as luggage and another bag, exh. P10 which she carried it.

D [17] At the cafe at Damascus Airport, Syria, the appellant befriended five Iranian men who were also travelling to Malaysia in the same flight with her. They were Saeid, Hamid, Shahrom, Mohamad and Abbas. Abbas was a tour leader who was familiar with Malaysia.

E [18] Having conversed with Abbas for about half an hour at the said cafe, Abbas showed her a plastic bag containing foodstuff which he claimed was not available in Malaysia. According to the appellant, Abbas sought her assistance to bring the packets in her bag, exh. P9 and to return back to him (Abbas) upon arrival at KLIA. The appellant agreed as she trusted Abbas. She was not suspicious of Abbas.

F [19] Upon arrival at the KLIA, the appellant was assisted by Hamid to retrieve her luggage from the carousel. As she approached the scanner machine, a customs officer requested her to open her bags at the examination counter. On examination of exh. P9, the drugs was found in the food packages which belonged to Abbas. The appellant was detained.

G [20] The appellant met these Iranian men again at the Sepang Magistrate's Court. In the course of giving her evidence in court, the appellant identified Hamid, Shahrom and Abbas. The record of appeal, vol. 2 at p. 161 reads:

Q : Can you still recognise them?

H A : Yes

Court : Hamid, Shahrom and Abbas called and identified.

I [21] The second defence witness was Hameedreza Mohammadi, SD2. According to SD2, he noticed Abbas sought the help of the appellant to bring the food packets in the appellant's bag to which the appellant's agreed. SD2 further said that he saw Abbas put the food packets in the appellant's bag, exh. P9. Abbas too helped the appellant to carry exh. P9 to the airport counter at Damascus for checked-in.

[22] Upon arrival at KLIA, Abbas had requested SD2 to help the appellant to get her bag as he (Abbas) wanted to go outside the building to get the taxi.

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[23] Further, SD2 said that he, Shahrom and Mohamad were tricked or duped by Abbas to carry his (Abbas) laptop which contained the drugs.

[24] The next defence witness was Inspector Hayati bt Zahrudin, SD3. SD3 was a narcotic investigating officer at IPD Sepang. According to SD3, on 1 October 2011 there were three Iranian men namely, Hameed, Shahrom and Mohamad who were arrested and charged with an offence under s. 39B of the Act. The appellant and another Iranian man were also arrested on the same day (1 October 2011) and the case against this Iranian man was investigated by Inspector Zulkifli bin Rasid. There were altogether four Iranian nationals who were arrested on 1 October 2011.

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Findings Of The Trial Judge At The Conclusion Of The Trial

[25] At the conclusion of the trial, having considered both the evidence of the prosecution and defence, the trial judge found as follows:

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- (i) The bag, exh. P9 which concealed the packages of “Good Day CappuccinO” and “COFFEEMIX 3 in 1” which contained the drugs was in the custody and control of the appellant;
- (ii) The exh. P9 was checked in by the appellant on a flight to KLIA and the luggage tag, P89 attached to exh. P9 was in the name of the appellant;
- (iii) The drug methamphetamine which was found in large amount 089.2g in exh. P9 was certainly not for personal consumption. The drug methamphetamine was for the purpose of trafficking: see *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64;
- (iv) The cunning manner in which the drugs was concealed in exh. P9 was indicative of the appellant’s knowledge of the drugs to avoid detection by the Malaysian authorities: see *Teh Hock Leong v. PP* [2008] 4 CLJ 764;
- (v) The trial judge agreed with learned Deputy that the appellant’s defence was a mere bare denial. The appellant pushed the blame to Abbas whom the trial judge found him to be a real person, but the appellant or SD2 failed to furnish the identity of Abbas to the prosecution. Thus the defence version could not be believed: see *Nachilongo Doreen (W/ Zimbabwe) v. PP* [2014] 1 LNS 24; [2014] 2 MLJ 597;
- (vi) The defence had made no attempt to call Abbas as a defence witness. The appellant had therefore failed to rebut that she carried the drugs with her knowledge and trafficking the same;

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- A (vii) The trial judge found her guilty and convicted as charged. She was sentenced to death under s. 39B(2) of the Act.

The Appeal

- B [26] Learned counsel canvassed only one issue before us. The trial judge had failed to appreciate the appellant's defence that it was Abbas who had given her the food packages and Abbas was not a fictional person. The defence implicating Abbas was raised and put to the prosecution witnesses at the earliest opportunity. Therefore sufficient weight ought to be given to the appellant's defence.

- C [27] The appellant's defence is clearly not a mere denial. However learned Deputy argued otherwise and agreed to by the trial judge. The appellant's defence was supported by the independent testimony of SD2, the Flight Manifest, exh. P103 and CCTV footages, exh. P106.

Our Decision

- D [28] Despite a credible explanation given in court by the appellant, which is supported by SD2 and SD3, the trial judge rejected the same and held that the appellant's defence had failed to raise any reasonable doubt in the prosecution's case. In summary, the trial judge held as follows with regard to the appellant's defence:

- E 56. Seterusnya ialah sama keterangan membela diri "T" telah berjaya di atas imbangan kebarangkalian menimbulkan keraguan yang munasabah terhadap kes *prima facie* pendakwaan? Saya bersetuju dengan hujah TPR bahawa pembelaan "T" ini bersifat penafian kosong, "T" telah membawa watak Abbas sebagai "culprit" (dalang) yang meletakkan dadah-dadah tersebut ke dalam beg beliau. Walaupun watak Abbas ini saya percaya bukanlah satu "fictitious character" akan tetapi kegagalan "T" sama ada melalui dirinya sendiri atau melalui SD2 untuk mengemukakan identiti Abbas kepada pihak pendakwaan membuatkan versi beliau tersebut tidak boleh dipercayai, saya merujuk kepada kes *Nachilongo Doreen (warganegara Zimbabwe) vs PP* 2 MLJ 597;

- G 57. Pembelaan "T" jelas meletakkan kesalahan ini kepada Abbas dan Abbas tidak pernah dibuat percubaan untuk memanggilnya sebagai saksi mengakibatkan pembelaannya sukar untuk dipercayai, malah tidak dapat menafikan fakta bahawa "T" telah membawa dadah tersebut didalam begnya dengan sepenuh pengetahuannya, dadah tersebut bertujuan untuk pendedaran melalui anggapan statutori;

- H 58. Di atas alasan-alasan ini saya berpuashati bahawa "T" telah gagal untuk menimbulkan keraguan munasabah terhadap kes pihak pendakwaan;

- I 59. "T" dengan ini didapati bersalah dan disabitkan di atas pertuduhan.

[29] During the prosecution's case, the characters of both Abbas and Hamid had been put to the prosecution's witnesses, namely SP6 and SP9. It was put to SP6 and SP9 that the actual culprit in this case was the Iranian man named Abbas and this suggestion crystallised into evidence by the testimonies of the appellant and SD2 during the defence case.

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[30] The trial judge however failed to appreciate the appellant's defence that it was Abbas who had given her the food packages despite making a positive finding that Abbas was not a fictitious character. Furthermore, this defence was raised and put to the prosecution's witnesses at the earliest reasonable opportunity during the prosecution's case and further, fortified her defence by identifying Abbas in the course of her giving evidence at the defence stage. Certainly, therefore, adequate weight ought to be given to the appellant's defence. It is clearly not an afterthought defence but one that was supported by the independent testimony of SD2 and more importantly the appellant had identified Abbas in court.

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[31] SD2 was called to testify where he disclosed the role played by Abbas. It was also proven that Abbas was the actual owner of the food packages found in the appellant's bag. SD2 had explained as to what had transpired at the cafe in Damascus Airport. Unfortunately, there was nowhere in his Grounds of Judgment that the trial judge had considered the evidence of SD2 and also as to why SD2's evidence could not be accepted by the court. The trial judge had clearly omitted the consideration of SD2's evidence which amounts to a serious non-direction warranting appellate intervention. In short, the trial judge had failed to comply with s. 182A(1) of the Criminal Procedure Code. In the case of *Prasit Punyang v. PP* [2014] 7 CLJ 392; [2014] 4 MLJ 282 where the conviction was set aside primarily on the ground that the trial judge did not consider the cautioned statement, the Court of Appeal said:

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On the facts of the present case, we find there is merit in the contention of learned counsel for the appellant. In accordance with the provisions of s. 182A(1) of the Criminal Procedure Code, it is the bounden duty of the learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and he shall decide whether the prosecution has proved its case beyond reasonable doubt. The legislature has advisedly used the term "all the evidence". The emphasis must be on the word "all". In the context of the present case, the cautioned statement tendered by the appellant is one of the evidence which the learned JC should take into consideration in order to make a finding whether or not the prosecution has proved its case beyond reasonable doubt. The aim of this provision is obviously to make certain that an accused person gets a fair trial. In the recent case of *Ahmad Mukamal Abdul Wahab & Ors v. PP* [2014] 1 MLJ 865; [2013] 4 CLJ 949, Hamid Sultan Abu Backer, JCA in delivering the judgment of this court has explained that the trial court has a duty and obligation to fairly and justly weigh the defence version and evidence (including the cautioned statement of the accused) or for that matter a story by the accused to reach a just result.

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A [32] *Prasit Punyang*, *supra* had been affirmed by the Federal Court *vide* Criminal Appeal No. 05-174-08-2013. Though *Prasit Punyang*, concerns a non-direction of the cautioned statement by the trial judge, it equally applies to a failure by the trial judge to direct his mind to the oral evidence of the material defence witness, in this case SD2, which may be opened or entitled the appellant to an acquittal.

B [33] The trial judge also seemed to have placed a burden on the defence to call Abbas to testify in court. According to the trial judge, there was no attempt by the defence to call Abbas as witness and as such, the appellant's defence cannot be believed. It is trite law that there is no burden placed on the appellant to call witnesses to corroborate her defence in court. By disbelieving the appellant's version of the story for failure to call Abbas as a witness, the trial judge had clearly placed a duty on the defence which is clearly erroneous and a misdirection. That is not the position in law. In the case of *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705, a doubt was created by the defence as regard the person who was wearing the yellow helmet. Secondly, the reason why the motorcycle fell down also raised doubt as to the actual person who threw the white bag containing the drugs. The doubts could have been resolved if one Yee Chin Koon was called as a witness. The court said:

E There is no duty upon an accused to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other (see *Goh Ah Yew v. PP* [1949] MLJ 150; *Abu Bakar v. R* [1963] MLJ 288; *Tan Foo Su v. PP* [1967] 2 MLJ 19). It is not the duty of the defence to fill in any gap in the prosecution case. The position is different where a presumption has been invoked thereby placing an onus on the accused to prove certain facts. Where there is such a burden on an accused the onus is on him to prove the facts and failure to call a material witness to establish the facts may result in an adverse inference being drawn against him (see *Baharom v. PP* [1960] MLJ 249; *PP v. Dato' Seri Anwar bin Ibrahim (No. 3)*). This, of course, is not the position in this case. The materiality of Yee Chin Koon therefore remains to be seen in the light of the defence to be advanced.

H [34] There is no duty on the part of the appellant to call any evidence including Abbas as her witness. This legal principle is reiterated in the case of *Azmer Mustafa v. PP* [2014] 8 CLJ 413; [2014] 3 MLJ 616 where one Yana was not called as a defence witness. The Court of Appeal observed as follows:

I There is no duty on the part of the appellant to call Yana as his witness. In fact, there is no duty on the appellant to call any evidence at all. The appellant is at liberty to adopt one course of action and not the other. Indeed it is the appellant's choice and whatever choice he makes, no unfavourable inference should be drawn against him (*Goh Ah Yew v. PP* [1949] 1 MLJ 150, *Abu Bakar v. Regina* [1963] 1 MLJ 288 and *Tan Foo Su v. PP* [1967] 2 MLJ 19).

Conclusion

[35] Based on the above reasons, the credible evidence of the appellant and also taking into account the supporting evidence of SD2, the documentary evidence in this case, the appellant has succeeded in rebutting the presumed knowledge under s. 37(d) of the Act on the balance of probability and also raising a reasonable doubt on the prosecution's case. The prosecution has, therefore, failed to prove a case of beyond reasonable doubt against the appellant.

[36] This is a proper case which warrant appellate intervention. We found the conviction to be unsafe. We, therefore, unanimously allowed the appeal by the appellant. The decision of the High Court is, therefore, set aside and she is set free.

A**B****C****D****E****F****G****H****I**